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No. 82-811

In the Supreme Court of the United States

OCTOBER TERM, 1982

TYRONE C. FAHNER, Attorney General, State of Illinois,

Petitioner,

vs.

UNITED STATES ex rel. BENEDETTO J. MASSARELLA,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

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RESPONDENT'S BRIEF IN RESPONSE

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Prefatory Statement

Respondent, Benedetto J. Massarella (hereafter, defendant, or Massarella) hereby submits this, his Response to the Petition of Tyrone C. Fahner for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, stating that he AGREES that this Court should review the decision of the Court of Appeals reversing the District Court's order denying his (Massarella's) Petition for a Writ of Habeas Corpus and remanding with

certain directions, specifically, that he be resentenced by the State Court pursuant to the law existing at the time of the offense.

* * *

The Opinion sought to be reviewed via the above-captioned Petition for Certiorari is the same as that sought to be reviewed via the separate Petition for Certiorari, timely filed by Massarella as Petitioner, presently pending in this Court as No. 82-844, entitled *United States ex rel. Benedetto J. Massarella, Petitioner, vs. Richard J. Elrod, Sheriff of Cook County, et al., Respondents.*

By letter from the Clerk of this Court, Massarella was requested to file a Response to Petition No. 82-811 on or before February 19, 1983. In addition to the following material, Massarella hereby adopts and incorporates by reference herein, as if fully set forth, his Petition No. 82-844, presently pending and on file with this Court, as part and parcel of his Response herein.

OPINIONS BELOW

The Opinion sought to be reviewed in both Nos. 82-811 and 82-844 is the decision of the Court of Appeals for the Seventh Circuit in *United States ex rel. Benedetto J. Massarella* v. *Richard L. Elrod, Sheriff of Cook County, Illinois and Tyrone Fahner, Attorney General of Illinois,* No. 81-1571, decided July 14, 1982. This decision, reported at 682 F.2d 688, is contained as App. A (p. 5a) in Petition No. 82-811, and as App. A (p. App. 1) in Petition No. 82-844.

The Seventh Circuit's Opinion reversed and remanded (with directions that petitioner be resentenced by the State Court pursuant to the laws in effect at the time of the offense) a decision of the United States District Court

for the Northern District of Illinois in *United States ex rel. Massarella* v. *Elrod, et al.*, No. 81 C 1752, dated April 7, 1981, reported at 510 F.Supp. 1082. The District Court's Order is contained as App. B (p. 3b) in Petition No. 82-811, and as App. C (p. App. 9) in Petition No. 82-844.

Before filing the habeas corpus petition which is the subject of the instant proceedings (that is, both 82-811 and 82-844) presently pending in this Court, Massarella had exhausted his State remedies.[1]

While the instant proceedings were pending in federal court, Massarella filed in the State trial court a Petition treated by that court as one brought under the Illinois Post-Conviction Hearing Act, Chap. 38, sec. 122 et seq., Ill.Rev.Stat. In the Brief in Opposition filed by Tyrone Fahner for the Respondents in this Court in Petition No. 82-844 (*i.e.*, the Petition for Certiorari wherein Massarella is Petitioner), the following statement is contained at p. 2:

> "Those proceedings [*i.e.*, the State post-conviction proceedings] terminated with the trial court denying

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[1] On Massarella's original, direct appeal in the State courts, the Appellate Court agreed that the indictment should have been dismissed due to improper participation of the Attorney General and reversed without deciding the remaining issues. *People* v. *Massarella*, 53 Ill.App.3d 774, 10 Ill.Dec. 912, 368 N.E.2d 507 (1 Dist. 1977). The Illinois Supreme Court allowed the State's petition for leave to appeal, reversed that decision, and remanded to the Appellate Court for resolution of the remaining issues *People* v. *Massarella*, 72 Ill.2d 531, 21 Ill.Dec. 898, 382 N.E.2d 262 (1978).

In its second opinion, the Appellate Court resolved all issues against defendant, *People* v. *Massarella*, 80 Ill.App.3d 552, 36 Ill. Dec. 16, 400 N.E.2d 436 (1 Dist. 1979). Leave to appeal was denied by the Illinois Supreme Court, and this Court denied defendant's petition for certiorari. *People* v. *Massarella*, 81 Ill.2d 586 (1980); *Massarella* v. *Illinois*, 449 U.S. 1077 (1981).

relief and the Illinois Appellate Court dismissing an appeal therefrom in an unreported order."

While it is true that the trial court denied relief and that the Appellate Court dismissed the appeal therefrom, No. 82-1348,[2] it is not correct that these orders "terminated" those post-conviction proceedings; for on January 4, 1983, Massarella timely filed his petition for leave to appeal in the Illinois Supreme Court, No. 57757, which petition is presently pending in that Court.[3]

JURISDICTION

We concur that this Court has jurisdiction over the instant Petition for the reasons set out at p. 3 of the Petition (as well as for the reasons set out at p. 2 of the Petition in No. 82-844).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are adequately set forth at pp. 3-6 of the Petition (and at pp. 2-3 of the Petition in No. 82-844), and are not repeated here to avoid unnecessary duplication.

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[2] The Appellate Court's order dismissing the appeal was not based on the merits, but, rather, was in response to the State's motion to dismiss the said appeal as "moot" on the basis of the very Court of Appeals decision at issue in the present proceedings pending in this Court on the separate petitions for certiorari, to wit, Nos. 82-811 and 82-844.

[3] One of the bases for Massarella's pending Petition for Leave to Appeal from the order dismissing his appeal is that the Seventh Circuit's opinion did *not* finally resolve all the issues raised in the State post-conviction proceedings; and we have pointed out to the Illinois Supreme Court in the Petition pending before it that both Massarella and the State have separately sought review in this Court from the said Seventh Circuit decision.

RESPONSE TO PETITION FOR CERTIORARI

For the reasons set forth in our Petition, No. 82-844,[4] as well as for the reasons set forth below, we agree that Certiorari should be allowed to review the decision of the Court of Appeals for the Seventh Circuit herein at issue.

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[4] The "Questions Presented" by Pet. No. 82-844, are as follows:

"1. On appeal from the District Court's denial of petition for writ of habeas corpus: where the Court of Appeals reversed, ruling that the State's reclassification of perjury from a misdemeanor to a felony, after commission of the act for which petitioner was charged, violated his federal constitutional rights under the *ex post facto* clause* because of adverse collateral consequences accruing to felonies but not to misdemeanors, did the Court of Appeals correctly further determine:

(A) that while the said retroactive transformation as to the nature of the offense violated the *ex post facto* clause, the resultant extension of the statute of limitations—a direct consequence of the said reclassification—was nonetheless constitutionally permissible?

(B) that the conviction itself need not be vacated, ruling the sufficient remedy for the *ex post facto* violation was to remand to the District Court with instructions that the cause be remanded to the state court for resentencing under the law in effect at the time of the offense—though petitioner had elected not to be sentenced thereunder?

2. In reaching these results upon the undisputed facts, did the Seventh Circuit misconstrue and misapply *Weaver* v. *Graham*, 450 U.S. 24 (1981), creating dangerous precedent for inappropriate and unconstitutional reliance on that decision?"

"* 'We hold, therefore, that Massarella's conviction of the retroactively reclassified offense of perjury violated the *ex post facto* clause.' (App. A, p. 5; Sl. Op. p. 5." [682 F.2d at 690]

As framed in the instant Petition (No. 82-811), the "Question Presented for Review" is as follows:

> "Whether the opinion of the court of appeals holding that a habeas corpus petitioner's voluntary election to be sentenced under a statute enacted after his offense violates the *ex post facto* clause conflicts with this Court's decisions in *Francis* v. *Henderson, Wainwright* v. *Sykes,* and *Engle* v. *Isaac.*" (Pet. for Cert. No. 82-811, p. i)

The so-called "voluntary election" creates an indefensible and unsupportable conundrum, and is indeed not a constitutionally valid "election" at all—as is argued in the still-pending State post-conviction proceedings.[5]

Massarella was forced to elect in the trial court whether to be sentenced under the new law or the old law. (Tr. 2295-97; 2303 [State Trial Transcript].) He chose the new law. (See App. A to No. 82-844, p. 4; 682 F.2d at 689-90 & 690 fn. 3.)

The decision of the Seventh Circuit below—requiring that Massarella be resentenced under the old law—cannot now be implemented without doing grave violence to his most basic constitutional rights, embodied not only in the *ex post facto* clause, but also in the concept of due process

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[5] Defendant Massarella's election is the subject of the still-pending State post-conviction proceedings. Adding to the tangled web concerning remedies, Appellate Court in its second opinion hinged its ultimate conclusion on the *ex post facto* issue against Massarella upon its perception that he had made a valid election to be sentenced under the new law: "Massarella elected to be sentenced under the Unified Code of Corrections." 36 Ill.Dec. at 22, 400 N.E.2d at 442. In denying the post-conviction petition, the trial court specifically held that the Appellate Court's second opinion was *res judicata* (PC R. 19-20), and stressed that defendant did not claim a right or desire to be sentenced under the old law. (PC R. 19). (References are to the Record on Appeal in No. 82-1348. See fn. 2, p. 4, *supra* and accompanying text.)

of law. Although the court admonishes that no "more onerous sentence" be imposed, (App. A to No. 82-844, p. 6; 682 F.2d at 690), the constitutionally-required standard, of course, is not the sentence actually imposed, but, rather, that which theoretically could have been imposed. *Lindsey v. Washington*, 301 U.S. 397, 402, 81 L.Ed. 1182, 1186 (1937).

That portion of the Seventh Circuit's decision holding that changing the nature of the offense after the fact is unconstitutional, is correct—but, for the reasons advanced in our Pet. No. 82-844, the decision does not go far enough with respect to remedies.

The selection of remedy mandated by the Seventh Circuit's opinion—that is, that Massarella be resentenced under the old law—places him in the constitutionally impermissible position of being resentenced under the very law he had elected not to be sentenced under, when made to choose in the trial court. Only vacature of the judgment of conviction, rather than resentencing, can ameliorate the constitutional violation.

CONCLUSION

For the reasons stated above, as well as for the reasons set out in our Petition No. 82-844, we agree that certiorari should be allowed.[6]

And, on the merits, the Seventh Circuit's order should be reversed and the cause remanded to the District Court with instructions to vacate Massarella's conviction and grant the Great Writ.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

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[6] We respectfully suggest that if Your Honors see fit to grant certiorari either upon No. 82-811 or upon No. 82-844, all of the questions presented by both of these petitions should be addressed on the merits.